2005

Scott A. Lunceford and Deborah Lunceford Harker v. Mona Vincent Lunceford and M. Daylee Jeffs as trustee of the Clyde M. Lunceford Trust : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SCOTT A. LUNCEFORD and DEBORAH LUNCEFORD HARKER,	:	
Plaintiffs/Appellants,	:	Case No. 20050027-CA
vs.	:	
	:	District Court Case No. 030404549
MONA VINCENT LUNCEFORD, an individual; and M. DAYLE JEFFS, in his capacity as Trustee of the Clyde M. Lunceford Trust,	:	
Defendants/Appellees.	:	

REPLY BRIEF OF APPELLANT
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE LYNN W. DAVIS AND DEREK PULLAN

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I. THE SCOPE OF APPELLANTS' APPEAL

Appellee Mona Vincent Lunceford ("Mona") makes two arguments related to the scope of Appellants' appeal that need to be addressed at the outset.

A. Appellants Have Appealed the District Court's Decision to Deny the Motion to Reconsider

First, Mona argues that "Appellants failed to argue in their opening brief that the district court abused its discretion in denying their motion to reconsider, and therefore that issue is waived on appeal." See Mona's Br., at 1. This is simply not the case. On the very first page of Appellants' opening brief, Appellants set forth as "Appellate Issue No. 2" the following issue: "Whether the district court erred in refusing to reconsider its ruling granting Mona's Motion to Dismiss." See Aplt. Br., at 1. Appellants pointed out that the standard of review on this issue was "abuse of discretion" (which differed from the *de novo* standard on the related "Appellate Issue No. 1," which was whether the district court erred in granting the Motion to Dismiss in the first place). Mona chides Appellants for not restating Appellate Issue No. 2 explicitly in *other places* in their brief, but Appellants are unaware of a requirement that an issue, to be preserved on appeal, must be mentioned *more than once* in an appellate brief.

In fact, the manner in which Appellants structured their brief was perfectly rational, and does not result in the waiver of any issue. Heading I in Appellants' brief was an argument that the "district court erred in determining that the Settlement Agreement can be unambiguously construed against Appellants." This argument goes to both Appellate Issue

No. 1 (whether the court properly granted the Motion to Dismiss, an issue that receives *de novo* review) and to Appellate Issue No. 2 (whether the court properly denied the Motion to Reconsider, an issue that draws review for abuse of discretion). Indeed, part of Appellants' argument centers around the Jeffs Affidavit (as opposed to Jeffs' letters or potential live testimony at the hearing), which did not even exist until the Motion to Reconsider. In their argument in their opening brief, Appellants point out the reasons why the district court erred in determining that the Settlement Agreement could be unambiguously construed against them, regardless of whether the standard of review is *de novo* or abuse of discretion. The mere fact that Appellants did not re-state the appellate issues and the appellate standards of review in their argument section, after already having stated them once, does not and cannot result in a waiver of any argument.

B. Appellants Have Not Waived Issues Raised in Their Complaint, But Not Germane to this Appeal or Decided by the District Court, By Not Raising Them in the Appeal

Next, Mona asserts that Appellants have waived certain issues raised in their original Complaint by not including them in their appeal. However, the issues Mona points to are not germane to this appeal and were not decided by the district court. For instance, Mona claims that Appellants have waived issues raised in their Complaint regarding (1) who is the proper successor Trustee of the Trust, (2) whether the three 2001 documents that Mona produced only after Clyde was dead are authentic or are forgeries, (3) whether Mona has improperly used rental income, and (4) whether Appellants are entitled to damages from Mona. See Mona's Br., at 16. This argument misperceives both the scope of this appeal as well as the scope of the district court's decision below.

As Mona acknowledges, Appellants raised a host of issues in their Complaint, including the four mentioned above, and sought broad-ranging relief against Mona for her actions in relation to the Trust. See R. at 001-039. On Mona's motion, the district court dismissed Appellants' entire complaint on Rule 12(b)(6), because it determined that the Settlement Agreement was unambiguous and that, therein, Appellants waived any claims they might have regarding the Trust. See id. at 182-191. The district court did not make any determinations, findings, rulings, or decisions regarding the merits of the four issues set forth in the preceding paragraph; rather, the *sole ground* for the district court's dismissal of the Complaint was that it determined that Appellants had waived their claims. Id. at 183.

One can appeal only what is actually decided by the district court, because appellate courts sit to review actual decisions of district courts. See, e.g., In re Eric Peterson Constr., 951 F.2d 1175, 1182 (10th Cir. 1991) (citing Singleton v. Wulff, 428 U.S. 106, 120 (1976), and stating that "[i]t is the general rule that a federal appellate court does not consider an issue not passed upon below"); see also United States Bldg. & Loan Ass'n v. Midvale Home Fin. Corp., 46 P.2d 672, 673 (Utah 1935) (stating that "[w]e may not determine questions . . . not heard or determined by the trial court"). In view of this, Appellants' appeal rightly brings only those issues decided by the district court—whether the court was correct in determining that the Settlement Agreement unambiguously provides that Appellants waived their claims—to the attention of this Court on appeal. Indeed, it would have been improper for Appellants to have attempted to brief the other issues raised in the Complaint and not decided by the district court; in fact, Appellants suspect that if they *had* done so, Mona would be claiming that Appellants could not raise the issues because they had not been decided below.

Thus, the only issues properly presented to this Court on appeal are the ones that the district court actually decided. Appellants certainly have not waived any of their other arguments—not decided by the district court—by not including them in this appeal. If this Court agrees with Appellants that their claims were not waived, and reverses the district court's decision and remands the case for further proceedings, the result will be that Appellants' Complaint is reinstated in its entirety, regardless of whether Appellants raised in this appeal every issue raised in their Complaint.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE SETTLEMENT AGREEMENT CAN BE UNAMBIGUOUSLY CONSTRUED AGAINST APPELLANTS

Turning to the merits of the appeal, the district court made two fundamental and reversible errors in this case, regardless of the standard of review used to examine those errors. The district court erred by, first, making the threshold determination that the Settlement Agreement is unambiguous without even considering relevant proffered evidence regarding the parties' intentions at the time of contracting, and, second, then proceeding to interpret that Agreement against Appellants as a matter of law in the context of a Rule 12(b)(6) motion. Because both parties espouse differing yet apparently tenable interpretations of the Settlement Agreement's provisions, that Agreement is by definition ambiguous, and the district court's decision to ignore Appellants' interpretation of the Agreement, especially where that interpretation was supported by Appellants' allegations in the Petition and by the Jeffs Affidavit, was erroneous and must be reversed.

A. Basic Rules of Contractual Interpretation

In their initial brief, Appellants laid out the Utah Supreme Court's rules for

interpreting contracts: in a nutshell, that the touchstone of contractual interpretation is giving effect to the parties' intent, and a court may not limit its review of a document to its four corners, even if the court believes the document to be unambiguous, because the court's reading of the document may not be the one intended by the parties. The court *must* consider "any relevant evidence" offered by the parties bearing on the meaning of the document. Only if the court believes, after viewing and considering all relevant evidence, that the document is and remains unambiguous, may the court proceed to interpret the document as a matter of law on a Rule 12(b)(6) or Rule 56 motion. See Aplt. Br., at 18-23 (citing cases).

Mona takes issue with Appellants' recitation of the rules of contractual interpretation, claiming that "Appellants' view . . . is hopelessly circular and impractical; whatever else, Utah law can't mean that." See Mona's Br., at 24. In support of her criticisms, Mona cites to a recent Tenth Circuit opinion in which Judge McConnell remarks that, in his view, "Utah law is unsettled on the issue." See Flying J, Inc. v. Comdata Network, Inc., 405 F.3d 821, 831 (10th Cir. 2005), petition for cert. filed, 74 USLW 3303 (Oct. 31, 2005) (No. 05-582). Judge McConnell's conclusions are based on contrasting cases (such as Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (Utah 1995)) that actually and squarely confronted the issue with other cases (such as WebBank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, 54 P.3d 1139) that did not squarely confront the issue but rather contain passing references to pre-Ward case law. And in any event, Judge McConnell's non-binding views are, in the end, *dicta*, because he did not have to squarely confront the issue either in order to reach his decision in the case, in part because "both parties [in the Flying J case] follow[ed] the expansive view" and believed that settled Utah law required courts to look

beyond the four corners of a document in making threshold determinations regarding ambiguity. See Flying J, 405 F.3d at 831.

In reality, the Flying J litigants (and not Judge McConnell) had the right answer. Utah law is not "unsettled" on the issue. The Utah Supreme Court squarely confronted this controversial issue, and squarely decided it in favor of the expansive view:

> When determining whether a contract is ambiguous, ***any relevant evidence must be considered***. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the 'extrinsic evidence of the judge's own linguistic education and experience.' Although the terms of an instrument may seem clear to a particular reader—including a judge—this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. ***A judge should therefore consider any credible evidence offered to show the parties' intention***.

See Ward, 907 P.2d at 268 (emphasis added) (citations omitted). In reaching its conclusion, the Ward court cited favorably to other cases around the country that had effectively abolished the "plain meaning rule," see id. (citing to, *inter alia*, Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968), and C.R. Anthony Co. v. Loretto Mall Partners, 817 P.2d 238, 242-43 (N.M. 1991)), and cited favorably to Professor Corbin's treatise, see id., which itself speaks favorably of the "trend toward abolishing the plain meaning rule" and cites G.W. Thomas and C.R. Anthony as having done just that, see 5 Corbin on Contracts §24.7, at 39, 41, 48 (1998). In short, the Utah Supreme Court in Ward knew exactly what it was doing, and knew that its holding represented a departure from earlier case law. Indeed, the Ward court expressly adverted to the existence of contrary case law, and stated that:

> While there is Utah case law that espouses a stricter application of the rule and would restrict a determination of whether ambiguity exists to a judge's

> determination of the meaning of the terms of the writing itself, ***the better-reasoned approach is to consider the writing in light of the surrounding circumstances.***

See Ward, 907 P.2d at 268 (emphasis added). The decision in Ward drew two spirited dissents, one from then-Chief Justice Zimmerman and one from Justice Russon. Chief Justice Zimmerman noted that the decision represented "a clear departure from the long-standing [plain meaning] rule," and expressed his opinion that this departure was unwise. Id. at 270-71 (Zimmerman, J., dissenting). Justice Russon foreshadowed the exact criticisms leveled by Mona in her brief, stating that the Ward majority "ignores well-settled precedent in favor of an approach that invites parties to create ambiguity in even the clearest contract provisions," and "upsets the expectations of contracting parties and litigation practices in contract disputes," and could result in every single contract-based litigation proceeding to trial rather than being decided on a motion. Id. at 270 (Russon, J., concurring in the result).

Despite these criticisms, expressed fully and eloquently by the Ward dissenters, the Ward majority carried the day, and the rule announced in Ward is still good law. It has been followed many times by both this Court as well as the Utah Supreme Court. See Peterson v. Sunrider Corp., 2002 UT 43, ¶19, 48 P.3d 918 (citing Ward, and stating that "[i]n determining whether a contract is ambiguous the court is not bound to consider only the language of the contract" and that "any relevant evidence must be considered"); Nielsen v. Gold's Gym, 2004 UT 37, ¶7, 78 P.3d 600 (citing Ward and Peterson); Gillmor v. Macey, 2005 UT App 351, ¶35 & n.14, 121 P.3d 57; Novell, Inc. v. The Canopy Group, 2004 UT App 162, ¶21, 92 P.3d 768. Both Judge McConnell and Mona correctly point out that Utah's appellate courts have, in several instances since Ward announced the new rule, cited in

passing to pre-Ward cases enunciating the old rule. See Flying J, 405 F.3d at 831. However, these are merely passing references, and cannot be taken as authority that Ward did not mean what it says.

The Utah Supreme Court has squarely addressed this issue, and has set forth careful (albeit new) rules for courts to use in interpreting contracts. Unfortunately, the message of Ward has not yet reached Mona or the district court, but the rule exists nonetheless. The rules of contractual interpretation, as set forth by Appellants in their opening brief, are correct and robust. The district court was required, under Ward and its progeny, to consider "any relevant evidence" in making its threshold determination that the Settlement Agreement was (or was not) ambiguous.

B. Without Considering "Any Relevant Evidence," the District Court Made the Determination—On a Rule 12(b)(6) Motion—That the Settlement Agreement is Unambiguous

The district court did not follow these basic rules in this case. The district court refused to consider "all relevant evidence" related to the intentions of the parties at the time of contracting, and instead limited its review merely to the four corners of the document. This alone was error. The district court then compounded the error by making a determination, without considering any of the proffered extrinsic evidence, that the Settlement Agreement was unambiguous and could be construed in Mona's favor as a matter of law.

Mona defends the district court's actions by arguing that Appellants, during the Motion to Dismiss, "never presented extrinsic evidence to the trial court on the issue of ambiguity." See Mona's Br., at 26. But this is not true. As Appellants have already noted

in their initial brief, during the hearing on the Rule 12(b)(6) motion, Appellants' counsel noted, on the record, the presence of Mr. Dayle Jeffs ("Jeffs") in the courtroom during the hearing, and informed the court that Jeffs was prepared to present testimony that he was Clyde Lunceford's ("Clyde") personal attorney at the time, that he was retained by Clyde to assist in drafting the Settlement Agreement at Clyde's instructions, and that Clyde had not intended the Settlement Agreement to cut off Appellants' rights to the Trust. Appellants' counsel also noted that Jeffs had written letters to counsel for both sides setting forth these views, and counsel attempted to introduce those letters to the court. See R. at 484, p. 37. Mona's counsel objected to the introduction of either the letters or Jeffs' testimony, on the ground that extrinsic evidence was not admissible on a Rule 12(b)(6) motion, and the district court sustained the objection and refused to allow introduction of the evidence. Id. Thus, Mona is simply incorrect when she argues that Appellants did not ever try to introduce extrinsic evidence supporting their interpretation of the Settlement Agreement.

Mona belittles these efforts, however, claiming that Appellants did not do enough to bring the matter to the attention of the district court, because Appellants did not ever argue, during the proceedings on the Motion to Dismiss, that the Settlement Agreement was "ambiguous." See Mona's Br., at 26. Rather, Appellants' arguments below had been that the Settlement Agreement unambiguously supported ***their*** interpretation. And that is the very definition of ambiguity: "[a] contract provision is ambiguous if it is capable of more than one reasonable interpretation." See Peterson, 2002 UT 43, ¶19, 48 P.3d 918; see also Ward, 907 P.2d at 269 (same). If two parties are simultaneously arguing that a document can be interpreted unambiguously in their favor, yet advance two very different interpretations, the

document is ***by definition*** ambiguous as long as both proffered interpretations are reasonable and/or tenable. Appellants are aware of no authority requiring the parties to incant the magic word "ambiguous" in order for this to be true. When presented with two apparently tenable interpretations of the Settlement Agreement, the district court should have recognized that the Settlement Agreement was ambiguous. The fact that neither Appellants nor Mona ever argued, during the Rule 12(b)(6) proceedings, that the document was "ambiguous" is irrelevant.

During the proceedings on the Motion to Reconsider, Appellants did argue that the Settlement Agreement was "ambiguous," and pointed out to the district court that this was so because both sides had advanced apparently tenable interpretations of the same document. But this did not appear to matter to the district court, which denied the motion to reconsider without even mentioning the Jeffs Affidavit or the "ambiguity" issue, because the court continued to believe that the Settlement Agreement was "plain on its face." See R. at 398.

The district court erred by ruling, both on the initial Rule 12(b)(6) ruling and on the ruling denying the motion to reconsider, that the Settlement Agreement was unambiguous ("plain on its face") and could be so interpreted without even considering relevant extrinsic evidence. In reality, case law obligated the district court to consider extrinsic evidence—including the letters and Jeffs' testimony—before determining that the Settlement Agreement was unambiguous. The district court's refusal to do so, based apparently upon a misunderstanding of Utah law, is reversible error.

This error is especially evident in the context of a Rule 12(b)(6) motion. As the district court itself stated, "the Utah Supreme Court has indicated that a Rule 12(b)(6) motion

to dismiss is proper if it clearly appears that a plaintiff ***can prove no set of facts*** in support of his or her claims." See R. at 185 (citing Coleman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990)) (emphasis added); see also Mackey v. Cannon, 2000 UT App 36, ¶9, 996 P.2d 1081 (stating that a trial court's ruling dismissing a case under Rule 12(b)(6) "should be affirmed only if it clearly appears [that] the complainant can prove no set of facts in support of his or her claims"). By bringing to the court's attention Jeffs' letters and Jeffs' potential testimony, Appellants were demonstrating to the court that there was in fact a set of facts which, if proven, would support their claims. At the Rule 12(b)(6) stage, the district court was obligated to allow Appellants the opportunity to conduct discovery and prove up the set of facts made evident by Jeffs' testimony.

C. The Jeffs Affidavit Is Admissible and Competent Evidence

Mona argues, however, that the Jeffs Affidavit is inadmissible in any event, because, Mona claims, "a witness cannot speculate on the thought processes of another." See Mona's Br., at 25 (citing Pepper v. State, 558 N.E.2d 899, 900 (Ind. Ct. App. 1990)). Mona's argument is simply not well taken. As Utah case law amply demonstrates, it is quite routine in contested probate matters for an attorney, who formerly represented the deceased testator or settlor, to offer testimony about what the testator or settlor intended a document to mean. Such testimony is perfectly competent and admissible. Jeffs' affidavit is no different.

Utah's appellate courts have long held that "an attorney [is] permitted to testify in an inquiry to ascertain, as between devisees under the client's will and a grantee claiming under a deed from the client made after the will, as to what was intended by the deed." See Webb v. Webb, 209 P.2d 201, 204 (Utah 1949). Indeed, the court in Webb summed up the rule as

follows:

> Thus where, after the death of the client, litigation arises between parties all of whom claim under the client and the question to be determined is not the existence of a right of action against the estate, but the intention of the decedent as to creation of various rights which remain ambiguous, the attorney may testify.

Id. This rule was more recently followed by the Utah Supreme Court. See Rentmeister v. DeSilva, 553 P.2d 411 (Utah 1976). In Rentmeister, the question to be decided was whether the settlor of a trust (now deceased) had intended that plaintiff receive $7,000 from the trust. The trial court allowed the settlor's attorney, who had drafted the trust documents, to testify at length about what the settlor intended, and the Utah Supreme Court affirmed the decision of the trial court.

In short, there is a long tradition of allowing attorneys for deceased settlors and devisors to testify in court, in contested probate matters, regarding what the deceased settlor or devisor intended. Jeffs' testimony is no different from the testimony allowed in Webb and Rentmeister. Jeffs was Clyde's personal attorney, and participated in numerous conversations with Clyde during the last years of his life during which Clyde confided in Jeffs regarding his intentions for the Trust. Jeffs was one of the two principal draftsmen of the Settlement Agreement, and consulted with Clyde about what that document ought to say, and had conversations with Clyde immediately after the drafting and signing of the Settlement Agreement in which Clyde told Jeffs that he still considered Appellants the residual beneficiaries of the Trust. See R. at 281-83. Jeffs' testimony on these points is

highly relevant and probative, and is perfectly competent and admissible.[1]

D. The District Court's Determination that the Settlement Agreement Is Unambiguous in Mona's Favor Was Erroneous

The district court's first error was refusing to consider Mr. Jeffs' testimony—clearly "relevant evidence"—in making its determination that the Settlement Agreement is unambiguous, as mandated by Ward and its progeny. The district court's second error was its actual determination that the Settlement Agreement is unambiguous in Mona's favor. When the entire document is examined, along with the parties' and Mr. Jeffs' respective interpretations, it becomes clear that the Settlement Agreement is, at a minimum, ambiguous, and cannot be interpreted as a matter of law in the context of a Rule 12(b)(6) motion.

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[1] Mona also spends a great deal of time arguing that this Court cannot consider the Jeffs Affidavit because Appellants attached it to the documents filed in support of the Motion to Reconsider rather than to the documents filed in opposition to the Rule 12(b)(6) motion, reasoning that Appellants should not get "a second chance to present the facts." See Mona's Br., at 19-21. This argument may hold water in a summary judgment setting, where the parties have a full and fair opportunity to develop the factual record through discovery prior to litigating any motions for summary judgment. Indeed, every single one of the cases Mona cites in support of her argument on this point is a summary judgment case. See id. (citing cases). Mona does not, however, point this Court to a single authority holding that parties are forbidden from introducing new evidence on a motion to reconsider *in the context of a Rule 12(b)(6) motion*. Appellants submit that this is because, in a Rule 12(b)(6) setting, the parties have not even had a *first* chance (let alone a *second*) to develop a factual record through discovery. By making Jeffs available for testimony during the hearing on the Rule 12(b)(6) motion, and by submitting the Jeffs Affidavit, all that Appellants have done is to point out to the trial court that there is a set of facts that, if proven, would support their interpretation of the Settlement Agreement, and that therefore dismissal is improper under Rule 12(b)(6). Mona's authorities are not to the contrary, and do not prevent this Court from considering Jeffs' testimony.

1. Even without consideration of the Jeffs Affidavit, Appellants' interpretation is tenable and reasonable, while Mona's proffered interpretation is not.

Even without taking Jeffs' testimony into account, Appellants' proffered interpretation is tenable and reasonable. Appellants pointed out to the district court that the phrases relied upon by Mona were intended to refer to an entirely separate claim by Appellants to the California Condominium and the Utah County Property—a claim, arising from a separate dispute with Clyde, that Appellants (rather than the Trust) had present fee simple entitlement to the property—and were not intended to refer to any rights Appellants may have had, or may have in the future, to inherit a remainder interest in the property through the Trust. This interpretation squares with Paragraph 4 of the Settlement Agreement, which states that Appellants will deliver a quit-claim deed *to the Trust*, and with Paragraph 5 of the Settlement Agreement, which explicitly reserves Clyde's right to use the Trust to bequeath any property to any person. When the language of the entire Settlement Agreement is examined together, it is clear that the intent of the parties was to have Appellants waive the *other* claims they had to the California Condominium and the Utah County Property, but not any rights they may have in the future to that same property through the Trust.

Mona, for her part, focuses on isolated phrases in the Settlement Agreement to support her interpretation, and ignores several important provisions at odds with her interpretation (Paragraph 5, for instance, which expressly reserves Clyde's right to use the Trust to bequeath any property to any person, including Appellants). Mona relies heavily on the provision stating that Appellants waived "entitlement to ***present or immediate testamentary interests*** in the Coronado Condominium and the Clyde Residence," focusing largely on the word

"testamentary." See Mona's Br., at 29 (emphasis added) (arguing that the only "testamentary" interest Appellants had in the Trust assets was through the Trust). Mona blithely ignores, however, the words that come immediately before the word "testamentary"—"present and immediate." At the time of the Settlement Agreement, Appellants' interest in the Trust corpus *through the Trust* was hardly "present and immediate"; indeed, the Trust was revocable and Clyde (as affirmed by Paragraph 5) retained the right to change it at any time. Moreover, Appellants' interest was a remainder interest, to begin only after Mona had enjoyed her life estate. A remainder interest in revocable trust assets is hardly a "present and immediate" interest in anything. Accordingly, and as the "present and immediate" language indicates, Appellants intended to waive *other* more "present and immediate" claims to the Trust assets, not their claim through the Trust, which would ripen, if at all, at some indeterminate time in the future.

In addition, the Settlement Agreement expressly recites, in the recitals, that Appellants are beneficiaries of the Trust. See R. at 084 (reciting that "[a]s of the date of execution of this Agreement, the Trustee [Jeffs] continues to serve as trustee of the Trust and the Trust beneficiaries are as stated in the Trust, as amended"). By signing the Settlement Agreement in January 2002, Mona agreed with that recital at the time. Yet later, and only after Clyde's death, Mona came forward with suspicious-looking documents allegedly signed by Clyde in 2001 *before the Settlement Agreement was executed* that purport to eliminate Appellants' interest in the Trust. If Clyde had really agreed with Mona to give the entire Trust corpus to her and had signed the three 2001 documents so amending the Trust, that 2002 recital would have been incorrect and fraudulent. On the other hand, the existence of the recital confirms

Appellants' interpretation: that Appellants were still remainder beneficiaries under the Trust, and the Trust had not been amended to remove them.[2] Thus, though the Settlement Agreement affirmatively states who the beneficiaries of the Trust were at the time, Mona claims that the Trust had actually been amended prior to that point, and, further, that the Settlement Agreement precludes anyone (including Appellants) from challenging her claim. Mona's interpretation is absurd, and does not square with the recitals.

Finally, Mona relies heavily on the Settlement Agreement's release language, which Mona characterizes as "the most comprehensive general release ever drafted." See Mona's Br., at 30. This is a mischaracterization. The release clause (Paragraph 9) released the "Claims" and related causes of action—the "Claims" is a term defined elsewhere in the Settlement Agreement, and is to include the specific claims set forth in Recital I (including Appellants' claim of "present or immediate testamentary interests" in the Trust assets). Mona's arguments are therefore circular: the parties to this case hotly dispute whether Appellants' claims in this case are among the "Claims" waived in the Settlement Agreement, and therefore the Release clause in the Settlement Agreement cannot be used as support for Mona's particular side of that argument. If the Settlement Agreement, as a whole, was

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[2] Mona also argues that the Settlement Agreement was itself an implied amendment of the Trust, see Mona's Br., at 31-32, even though it does not so state, and even though it expressly left Clyde's right to tinker with the Trust unimpaired. Indeed, this portion of Mona's brief seems to indicate an uncertainty, on the part of Mona herself, with respect to how the Settlement Agreement can be reconciled with the continued existence of the Trust. See id. (arguing that the Agreement amended the Trust, but putting forth varied arguments regarding how and to what extent the Trust may have been amended). The reality is that the Settlement Agreement did not amend the Trust in any way; Appellants' proffered interpretation of the Settlement Agreement (as opposed to Mona's) can be fully squared with the continued existence of the Trust.

intended to cover the claims raised in this case, then they are waived; if the Settlement Agreement, as a whole, was not so intended, then the claims are not waived.

Appearing to concede this, Mona next argues that the claims in this case are "related to" or "arise out of" the "Claims" waived in the Settlement Agreement, and are therefore released under Paragraph 9. See Mona's Br., at 30. This is absolutely false. This is the point that neither Mona nor the district court can seem to understand: the "Claims" waived in the Settlement Agreement had to do with long-simmering family disputes about the family LLC and other issues. The issues raised in this case have to do with, *inter alia*, whether Mona forged three documents purporting to grant her complete control over the Trust, and over whether Appellants are still remainder beneficiaries of the Trust. The two sets of claims are not related, and one does not arise out of the other.

In short, even if one were to restrict review of the Settlement Agreement to the four corners of the document, the Agreement's actual terms are far more in line with Appellants' interpretation than they are with Mona's. Appellants' interpretation is, at a minimum, tenable and reasonable, and therefore the district court erred in construing the document against them as a matter of law on a Rule 12 motion.

2. Consideration of "all relevant evidence," including the Jeffs Affidavit, cements Appellants' interpretation as the correct one.

When one expands the inquiry, as commanded by the Utah Supreme Court, beyond the four corners of the document to "all relevant evidence," it becomes absolutely clear that the Settlement Agreement is, at a minimum, ambiguous, and that Appellants' interpretation is more than merely "tenable" or "reasonable." Indeed, it becomes clear that Appellants'

interpretation should ultimately prevail as the correct one.

The Jeffs Affidavit is devastating to Mona. As soon as a court actually considers it, Mona's entire position on the Rule 12(b)(6) motion will fall apart. Appellants suspect that this is why Mona spends so much of her brief arguing that the Jeffs Affidavit is "prejudicial" and should not be considered by either this Court or the trial court. If this case is remanded for discovery, Jeffs will be deposed, and will testify, *inter alia*, about the conversations he had with Clyde wherein Clyde still considered Appellants residual beneficiaries of the Trust, even after execution of the Settlement Agreement. Jeffs will also testify about his grave suspicions of Mona and the mysterious appearance, immediately after Clyde's death, of the three 2001 documents. Jeffs will also testify that he had a large role in drafting the Settlement Agreement upon Clyde's instructions, and that the parties to that Agreement did not intend to amend the Trust or waive any of the claims that Appellants brought below.

In fact, this is a case that proves the wisdom of the rule announced in Ward. The district court, using its own lens and its own preconceived notions of the meaning of words, ruled that Appellants had waived their claims to the Trust assets, and ruled that the document was *unambiguous* on this point. However, despite the district court's apparent certainty regarding the meaning of the document, the available extrinsic evidence clearly indicates that the parties intended something different. If courts are truly to give effect and meaning to the parties' intent—the supposed touchstone of contractual interpretation and enforcement—the available evidence regarding that intent must be considered.

If the district court had considered Jeffs' testimony, it would have been impossible for it to conclude that the Settlement Agreement was unambiguous in Mona's favor. In reality,

Jeffs' affidavit establishes Appellants' interpretation as the correct one, or, at a bare minimum, makes Appellants' interpretation "tenable" and "reasonable" for the purposes of an ambiguity determination, and makes it impossible for the district court to construe the Settlement Agreement in Mona's favor on a Rule 12(b)(6) motion.

Thus, the district court's determination that the Settlement Agreement was unambiguous, and could be interpreted as a matter of law in Mona's favor on a Rule 12(b)(6) motion, was erroneous and should be reversed. At a minimum, the Settlement Agreement is ambiguous, and therefore its interpretation must await discovery and testimony regarding its meaning.

III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES TO MONA

Finally, the district court should not have awarded attorneys' fees to Mona. The district court's award of attorneys' fees was based on an erroneous ruling that the Settlement Agreement could be unambiguously interpreted in Mona's favor on a Rule 12(b)(6) motion. This ruling is wrong, and should be reversed for the reasons set forth above. Because Mona should not have been the prevailing party on the motion, the district court's award of attorneys' fees in Mona's favor should be reversed as well.

Mona contends, however, that even if the district court's decision is reversed, "Mona would still be entitled to some attorney's fees," because "Appellants have brought many more claims [in their Complaint] than they have chosen to defend in this appeal." See Mona's Br., at 34. This argument is misguided, for the reasons stated above, in part I.B. The district court did not rule on the merits of Appellants' individual affirmative claims (e.g., that Scott

rather than Mona is the successor trustee, and that the three 2001 documents are not authentic); rather, the court simply ruled that all of Appellants' individual affirmative claims were waived under the "unambiguous" terms of the Settlement Agreement. Appellants cannot appeal issues not decided below, and therefore did not burden the appellate record with such issues. This does not and cannot result in a waiver. If the district court's decision is reversed, Appellants' entire Complaint will be reinstated, and Appellants will be free to argue and prove their claims as pleaded. No final judgment will, in that instance, have been rendered in favor of anyone, and Mona will have no entitlement to attorneys' fees on any issue.

CONCLUSION

For all of the foregoing reasons, the district court's orders granting Mona's Rule 12(b)(6) motion to dismiss, as well as the order denying Appellants' Motion to Reconsider, should be reversed, and the attendant order granting Mona attorneys' fees and costs should also be reversed. This case should be remanded for further proceedings, including discovery as to the intent and meaning of the Settlement Agreement, and trial.

DATED this 7th day of December, 2005.

JONES, WALDO, HOLBROOK & McDONOUGH

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2005, I caused to be sent, via hand-delivery, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

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